

Venkareddy Chennareddy v. U.S. General Accounting Office

Docket No. 91-01

Date of Decision: February 6, 1992

Cite as: Chennareddy v. GAO (2/6/92)

Before: Jessie James, Jr., Chair

Reprisal

Retaliation

Discrimination

Prima Facie Case

Disparate Treatment

DECISION OF ADMINISTRATIVE JUDGE

This matter is before the Administrative Judge pursuant to the provisions of the General Accounting Office Personnel Act ("GAOPA"), as amended, 31 U.S.C. Section 731, et seq. (1988).¹

Petitioner is a Band II Economist in the Programming Evaluation and Methodology Division (PEMD) of the General Accounting Office ("Respondent"). On January 29, 1991, Petitioner filed a pro se Petition for Review with this Board in which he alleged that the General Accounting Office had discriminated against him on the basis of his race and national origin and that it retaliated against him in 1989 when Respondent failed to give him a performance bonus and failed to select him for promotion to a Band III position as a Social Science Analyst.

Petitioner's pro se petition contained two grounds of contention. In Count I of his petition, Petitioner alleged that Respondent had unlawfully denied him a performance bonus in 1989, in retaliation against him for having previously filed an EEO complaint against Respondent. In Count II Petitioner alleged that Respondent discriminated against him because of his race and national origin (Asian) in refusing to promote him to a Band III Social Science Analyst position in 1989. He never stated his race nor country of origin. As relief, Petitioner requested that he be retroactively awarded the performance bonus and the promotion allegedly denied to him, and that he also received back-pay, costs and attorney fees.

On February 19, 1991, Respondent filed its response in opposition to Petitioner's Petition for Review. In its response, Respondent generally denied Petitioner's allegations, and stated as a defense that Petitioner did not receive a performance bonus in 1989 because his relative performance and overall contributions to his Division were not sufficient to warrant receipt of a bonus. Respondent further argued that Petitioner did not receive the promotion in question because he did not make the best qualified list.

After the matter was set for hearing, the parties engaged in extensive discovery, which resulted in the exchange of several discovery motions between the parties. The discovery motions gave birth to numerous pre-hearing and hearing discovery disputes whose resolution required the intervention of the Administrative Judge.²

On April 16, 1991, near the first discovery cut-off date, Petitioner retained counsel to represent him and his counsel entered his appearance in this matter. Because of the late appearance of counsel and the impending close of discovery, the discovery cut-off date was extended; Petitioner was granted additional time within which to respond to an Order of the Administrative Judge regarding the discovery request of the Respondent; and the hearing date was extended several weeks to accommodate the extension of the discovery cut-off date.

The hearing in this matter was held on June 19, and July 1, 9, and 11, 1991. Pre-hearing and post-hearing briefs were submitted by the parties.

CONTENTIONS OF THE PARTIES

Petitioner contends that he was denied a bonus as a result of retaliation for his previous involvement in equal employment opportunity (EEO) activity. Specifically, Petitioner alleges that in 1984 he filed a series of complaints charging that he had been denied several promotions because of discrimination.³ According to the testimony of the Petitioner, Eleanor Chelimsky, the Assistant Comptroller General for the Program Evaluation and Methodology Division (Assistant Comptroller General for PEMD) was the alleged agency discriminating official in one of the EEO complaints he filed in 1984, and Chelimsky was also the sole deciding official in the decision by Respondent not to award Petitioner a bonus in 1989. Petitioner alleges that he was denied the bonus because of discrimination and retaliation, as evidenced by the fact that his score on the bonus ranking system was higher than that of many of the persons in his Division who received bonuses; that he was placed in a one-person unit and was the only one-person unit in his Division that did not receive a bonus; that the Assistant Comptroller General for PEMD admitted that she was unfamiliar with his work; and that he had been intentionally assigned to work that was far below his skill level, experience, education and general qualifications.

With respect to the failure of Respondent to promote Petitioner to the position of Band III Social Science Analyst, Petitioner contends that his failure to receive the promotion was the result of discrimination based upon his race and national origin. Petitioner argues that he was the victim of discriminatory treatment in the promotion process because his application for the promotion was downgraded for technical deficiencies, while the applications of other candidates (including the applicant who received the promotion) had technical deficiencies that should have disqualified them, but that they were neither disqualified nor downgraded. Petitioner further argues that the selection process for the promotion was rigged against him because the selection panelists had knowledge of the previous EEO complaints he filed against the Respondent. With that knowledge, the panelists deliberately ignored his history of achievements while employed by Respondent and selected a candidate who was less qualified than he is in terms of education, experience and time of service with the Respondent.

With respect to the denial of Petitioner's bonus, Respondent contends that Petitioner failed to establish a prima facie case of retaliation. Respondent asserts that Petitioner failed to provide evidence of any protected activity about which management was aware, and what that protected activity was, who was involved, and why the Assistant Comptroller General for PEMD would be interested in retaliating against him.

Respondent further argues that, even if Petitioner could establish a prima facie case of retaliation, the evidence of record clearly establishes that Petitioner was denied a bonus purely for legitimate, nondiscriminatory reasons. Respondent asserts that employees are awarded bonuses on the basis of the significance of the work they perform and the extent to which that work contributed to the overall mission of their respective divisions during the rating period. Respondent states that its employees were asked to explain the significance of their contributions during the rating period by filling out contributions statements, and the statements were then assessed by an evaluation panel as part of the assessment process. Respondent contends that Petitioner's contribution statement was deficient because it described work that was not performed during the rating period, work for which Petitioner received poor performance ratings, and work that had to be partially re-written by Petitioner's supervisor. Respondent argues that Petitioner did not demonstrate that he had performed work during the rating period that would have entitled him to receive a bonus in comparison to the employees who were awarded bonuses; and that the Petitioner failed to show that he engaged in protected activity.

With respect to Petitioner's claim that he was denied a promotion to the Bank III Social Science Analyst position, Respondent contends that Petitioner's non-selection for the position was the result of neither discrimination nor retaliation. Respondent further argues that Petitioner was not selected because he was not as qualified as the other candidates who made the best qualified list. Respondent insists that the promotional selection was based, in large measure, on the ratings the candidates received on their more recent performance appraisals. According to Respondent, the selection panel looked closely at the applicant's abilities in the areas of research, planning, supervision, data gathering, documentation, and communication, and that in Petitioner's performance appraisals, he was ranked only "fully successful" in the job dimensions relevant to research, planning, supervision and communication, while the other candidates had been appraised by their supervisors at the exceptional or superior level in those dimensions. Respondent also asserts that the evidence on record shows that on Petitioner's penultimate performance appraisal, he was evaluated as needing improvement in the areas of oral and written communication, data gathering, data analysis, supervision, and documentation and that his work tended to be disorganized. Petitioner's most recent performance appraisal indicated that his work in these areas had not substantially improved, according to Respondent.

Finally, Respondent argues that Petitioner presented no evidence that could lead to an inference of discrimination or retaliation, and that Petitioner made no showing that the reasons offered for his non-selection were pretextual.

LEGAL FRAMEWORK FROM WHICH TO VIEW THE CONTENTIONS OF THE PARTIES

The proper framework from which to view Petitioner's claim of discrimination and retaliation and Respondent's denial thereto, is one which has long been accepted and recognized by the Supreme Court and this Board. That framework may be found in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the framework of McDonnell Douglas Corp., the very essence of Petitioner's claim of discrimination and retaliation must be extracted from its skeletal outline and re-cast over the frame for review set forth in McDonnell Douglas Corp.

Stripped of its fleshy outer covering, the very essence of Petitioner's complaint is that Respondent treated him differently than it treated other employees and that the basis of the difference in treatment is his national origin, his race and retaliation for prior EEO complaints he filed. Accordingly, in order to prevail,

Petitioner must first establish a prima facie case of discrimination or retaliation. Id. The initial creation of the prima facie case by Petitioner is important to the case because it eliminates the most common nondiscriminatory and nonretaliatory reasons for Petitioner's failure to receive a bonus and his failure to be selected for the Bank III Social Science Analyst position. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Petitioner's establishment of the prima facie case also creates a presumption that Respondent unlawfully discriminated or retaliated against him. That presumption must be overcome by the Respondent, if the Respondent is to prevail. McDonnell Douglas Corp., supra.

Petitioner's burden in establishing his prima facie case is not an inflexible or onerous burden. Id. The system of analysis set forth in McDonnell Douglas Corp. was never intended to be rigid, mechanized, or ritualistic. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). Petitioner need only produce facts from which an inference of discrimination or retaliation can be made.

To establish a prima facie case of discrimination under a claim of disparate treatment in non-selection or failure to promote, Petitioner must show that he belongs to a protected group; that he was qualified for and applied for the position or promotion in question; that he was denied the promotion or was not selected; and that other employees of similar qualifications who were not members of his protected group were promoted or selected for a position. Valentino v. United States Postal Service, 674 F.2d 56 (D.C. Cir. 1982). Similarly, to establish a prima facie case of discrimination with respect to the award of a bonus, Petitioner must show that he belongs to a protected group; that he was qualified for and applied for an award of a bonus; that he was denied the bonus award; that other employees of similar qualifications who were not members of Petitioner's protected group received bonus awards at the time his request for a bonus award was denied. McDonnell Douglas v. Green, 411 U.S. at 802.

To establish a prima facie case of retaliation, Petitioner must show that he engaged in protected activity; that the Respondent had knowledge of his protected activity; that Respondent took an action that disadvantage Petitioner; and that there exists a causal connection between the protected activity and the ensuing adverse action. Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass 1976), aff'd 545 F.2d 222 (1st Cir. 1976); Brown v. Biglin, 454 F. Supp. 394 (D.C. Pa. 1978); Guilday v. Department of Justice, 485 F. Supp. 324 (D.C. Del. 1980).

Once Petitioner has established his prima facie case of discrimination (or retaliation), the burden of proof shifts to the Respondent to articulate a legitimate, nondiscriminatory (non-retaliatory) reason for Petitioner's non-selection for promotion and his failure to receive an award of a bonus. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981); McDonnell Douglas Corp., supra. Respondent need only produce evidence of a legitimate, nondiscriminatory and non-retaliatory reason for not selecting Petitioner and not awarding him a bonus. Burdine, supra; Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978). Respondent must present with clarity and reasonable specificity a legitimate, nondiscriminatory and non-retaliatory reason for Petitioner's non-selection, non-promotion, and non-receipt of the award of a bonus. 450 U.S. at 254-56, 258. To satisfy this "intermediate burden," Respondent is not required to convince the Administrative Judge that the better applicant, or that the best employees were awarded bonuses. Id. at 258-59. However, Respondent is obligated to produce evidence which would lead to a rational conclusion that its employment decision was not motivated by discriminatory or retaliatory animus. Id. at 257.

FINDINGS AND CONCLUSIONS

Petitioner is and, at all time relevant to this proceeding has been a Band II Economist in the Program Evaluation and Methodology Division (PEMD) of Respondent. Petitioner has an M.A. in Economics, M.S. in Statistics and a Ph.D. in Economics Analysis, Economics, Mathematical Statistics and Operation Research. Petitioner also has ten years of teaching experience. Petitioner began his employment with Respondent in 1978 as a GS-12 Economist. Approximately nineteen months thereafter, Petitioner was promoted to GS-13. Tr. 48-49.

As an Economist, Petitioner reviews literature research in economics which may be of use to GAO Evaluators. He also provides analytical background information, develops models and writes technical reports for appendices and chapters for Evaluators. Tr. 358-363. In general, Petitioner provides support services for Evaluators within GAO. Tr. 48-49, 362-366.

The Program Evaluation and Methodology Division has approximately ninety to one hundred employees and is divided into three subdivisions or units. The three subdivisions or units are PEPSA (Physical Systems), PEHSA (Human Resources), and Quality Control. Petitioner is one of six employees assigned to the Quality Control Unit. Tr. 368.

The bonus which Petitioner claims he was wrongfully denied, had its genesis in Respondent's "Pay For Performance System (PFP)" which was initiated in 1989. PFP consists of two components, a bonus component and a permanent merit increase component. Respondent initiated PFP by phasing in the bonus component in the summer of 1989.⁴ The purpose of the bonus component was to award employees for excellent work.

To determine who among its employees would receive a bonus, Respondent established internal regulations which provided guidance and procedures for awarding bonuses. See Respondent's Exhibit #14. Respondent's regulations created what is called an "assessment process".⁵ The "assessment process" covered the rating period beginning June, 1988 and ending June, 1989. Petitioner was considered for receipt of a bonus during this period and asserts that he was improperly denied a bonus.

Thus, Petitioner did establish a prima facie case of discrimination based upon his national origin and race, in that he alleges that he is of Asian and Indian (not Native American) origin (Tr. 424); he submitted the appropriate documents to be considered for the award of a bonus; he met the minimal paper requirements for consideration and was rejected for a bonus while others not of his protected group received bonus awards.

Petitioner also established a prima facie case of retaliation, even though he failed to provide specific information about the EEO activity he participated in. This finding is premised on the testimony of the Assistant Comptroller General for PEMD that she would always remember the EEO lawsuit filed against her in 1985 or 1986 by the Petitioner. Under the Supreme Court's holding in Aikens, this testimony is sufficient to find that Petitioner did engage in protected activity.

Having found that Petitioner engaged in protected activity, all roadblocks have been removed from Petitioner's establishment of his prima facie case of retaliation. Petitioner only had to present evidence that he engaged in protected activity; that the Respondent had knowledge of the protected activity; that, subsequent to the protected activity, Respondent took an adverse action against Petitioner; and that there is a causal connection between the protected activity and the adverse action.⁶ More acceptable evidence of

Petitioner's participation in EEO activity would have included a showing that an EEO complaint was filed, the nature of the allegations contained in the complaint, the date and place where the complaint was filed, and the establishment of a causal connection between the filing of the prior complaint and the failure of Respondent to select him or to award him a bonus. Although Petitioner failed to make this complete showing, Petitioner did meet the minimal requirements for creation of his prima facie case.

Even though Petitioner did establish his prima facie case of discrimination and retaliation, the evidence presented in the record is not sufficient to sustain Petitioner's ultimate burden of proving discrimination or retaliation. In point of fact, Petitioner failed to establish pretext or to overcome the legitimate reasoning given by Respondent for refusing to award him a bonus.

The process of assessing employees to determine whether they merited receipt of a bonus award took place during the summer of 1989 and the bonuses were awarded in September of 1989. The assessment process covered evaluator and attorney positions. Tr. 552-553. The Evaluator positions covered were those Band I (full performance), Band II (full performance), and Band III (full performance).

All employees who were considered for receipt of bonuses in the summer of 1989 were assessed in the unit to which they were assigned. Respondent defined a unit as a regional office, a division or an office, if they employee was assigned to a staff office. Tr. 559. Based upon the evidence presented, this definition merits more acceptance than that offered by the Petitioner⁷ Each employee was assessed within his or her unit. However, a division could be divided into several units. Accordingly, PEMD, as a division, was defined as a unit for purposes of the assessment process. Therefore, Petitioner was not placed in a one person unit, for purposes of assessment of the bonus, as he claims. If he had been, no other employees assigned to PEMD would have been assessed and Petitioner does not assert that that was the case.

Within each unit, a management review group was created to perform the actual assessment of the employees within that unit. The number of management review groups within a unit or a division depended upon the number of subgroups created within the unit or division. A typical division or unit might have as many as five or six management review groups for assessment of its subdivisions, and separate management review groups for its various front office staffs. The front office staff included all employees assigned to the office of the Assistant Comptroller General. In PEMD, Petitioner was assigned to the front office staff. Tr. 362-363. Thus, he was grouped in a subunit of PEMD and assessed as part of the front office staff of PEMD. While Petitioner claims to have been adversely affected by his placement, he offered no evidence to sustain his claim. Petitioner presented no evidence that this process was discriminatory or retaliatory against him or that it was created for a discriminatory or retaliatory purpose.

The management review groups were made up of the Band III's and the SESers within the units, who supervised the staff within the unit or subunit. In other words, the supervisors assessed their own staffs. Tr. 578. Each management review group was tasked with the responsibility of reviewing, as separate and individuals groups, all GS-12s, all GS-13s, and all GS-14s within their respective unit or subdivision, and to rank them accordingly on separate lists of GS-12, GS-13, and GS-14. The three lists could not be merged or consolidated into one list.

In Petitioner's case, he was the only GS-13 assigned to the front office staff. Tr. 396-397. For purposes of awarding bonuses, the front office staff had five GS-15s, no GS-14s, one GS-13, and two GS-12s. Therefore, Petitioner was properly placed on the GS-13 list and because there were no other GS-13s in his assessment unit (i.e., front office staff), he properly appeared on a list by himself. There was no evidence presented by Petitioner that would lead to a conclusion that the basis of his placement on the separate list

was a discriminatory or retaliatory motive. Petitioner, during his testimony, appeared confused about how Respondent went about creating the three lists and establishing his placement. However, Petitioner offered nothing to refute the very credible testimony of the Deputy Assistant Comptroller General for Human Resources and the Assistant Comptroller General for PEMD on this issue.

To assist the management review groups in ranking the employees, the management review group was given each employee's prior performance ratings and an individual contribution statement prepared by the employee. In addition, the group members could use their individual and collective knowledge of the employees in deciding how to rate and rank them. An employee could receive from the management review group a total of sixty points, forty points for their performance appraisals and twenty points for their contribution statements.⁸

Petitioner received a total of 50.43 points from his management review group. Petitioner does not appear to question his rating by the management review group. Instead, he argues that having received that score, there were others who received a lesser score who were awarded bonuses. Because the management review group did not make the final decision as to who on the various lists would be awarded a bonus, and Petitioner does not question his score, it would follow that he did not point to any discriminatory or retaliatory act taken against him in the rating and ranking process by the management review group. Instead, Petitioner points his finger at the final decision made by the Assistant Comptroller General for PEMD.

Once the employees were rated and ranked and the three lists were created, the lists were forwarded to the unit, or in Petitioner's case, to the Division head, who decided who would receive a bonus. The only limitation placed on the unit head in deciding who would receive a bonus, was that they had to follow the order of the ranking that was forwarded to them. For example, if the unit head wanted to give the seventh person on a particular list a bonus, the six employees above the seventh employee had to be awarded bonuses. The only other limitation was that only fifty (50) percent of the employees could be awarded bonuses. This brings us to the heart of Petitioner's claim of discrimination and retaliation in the awarding of the bonuses by Respondent. In Petitioner's unit, the final decision not to award him a bonus was made by the head of his Division, the Assistant Comptroller General for PEMD. As discussed above, throughout Petitioner's testimony, he suggested that he and the Assistant Comptroller General for PEMD had been involved in prior EEO activity, but he never explained the nature or substance of the EEO activity. However, Petitioner's claim that others with scores lower than his were awarded bonuses is sufficient to further establish his prima facie case of discrimination and retaliation.

Having established a prima facie case, Petitioner failed to overcome the legitimate business reason given by the Assistant Comptroller for PEMD for refusing to award him a bonus. The Assistant Comptroller General for PEMD testified that when she received the three lists, they did not contain the scores of the employees. The lists contained just a mere listing of the employees' names, in rank order. Tr. 367-369, 383. This testimony is consistent with the testimony given by the witnesses. Tr. 566. Therefore, at the time she made her selection, she did not know the scores of the employees and could not have taken the scores into consideration. This testimony was confirmed by the Deputy Assistant Comptroller General for Human Resources, who testified about the assessment process. Tr. 568.

Also, the Assistant Comptroller General for PEMD testified that it was her decision alone as to whether to award a bonus to the Petitioner and his fellow employees. Tr. 370. She testified that she was limited in awarding bonuses by the requirement that only fifty percent of the employees could be awarded a bonus;

and as a result, in her assessment, she looked at the degree to which an employee's performance really exceeded what would normally be expected of any employee. Tr. 371. In other words, an employee could not receive a bonus for just doing his or her job. They had to do more. Again, this testimony is consistent with that of the Deputy Assistant Comptroller General for Human Resources.

Finally, the Assistant Comptroller General for PEMD testified that in making her decision, she looked across each grade level and she looked at the individuals who were being rated, she looked at the performance appraisals, the quality of the performance as described in the contribution statements, and what she knew about the employees's performance. Tr. 383, 386, 400. In the case of Petitioner, when she reviewed his performance appraisals, she found that they were poor or low (Tr. 386) and when she evaluated his contribution statement, she found that the work he described in the statement was work which had not been completed during the assessment period. Petitioner concedes that this testimony is correct. Tr. 509; 515-517. The work on the Social Security assignment, described in his contribution statement, was work that had been completed earlier. Tr. 517. Even if the work had been completed during the proper rating period, Petitioner testified that he did very little work on the project, and according to the Assistant Comptroller General for PEMD, when she checked with the supervisor of the project, he reported that the work Petitioner did was poor. Tr. 392, 505-06. It follows that Respondent's reasoning for not awarding Petitioner a bonus appears legitimate and business like, not discriminatory or retaliatory.

To aid in his showing of pretext, Petitioner asserted that while in the halls, alone, the Assistant Comptroller General for PEMD told him he would not get a bonus and that she was not going by the scores, as far as he was concerned. The Assistant Comptroller General for PEMD denied making these statements and I find her testimony on this issue credible. Even if the statements attributed to the Assistant Comptroller for PEMD were made, the statements appear to correctly describe the process adopted by Respondent to award bonuses, in that no scores were forwarded to the Assistant Comptroller General for PEMD. She received only a rank ordering of the names of the eligible employees.

Of further noteworthy consideration is the fact that of the three Asians in PEMD, two of the three were awarded bonuses. Tr. 571. Petitioner was the only Asian in PEMD who was eligible to receive a bonus award who did not receive one. This fact and the absence of other discriminatory factors makes Petitioner's claim of national origin discrimination difficult to sustain. Hence, Petitioner failed to show pretext or to overcome the legitimate business reasons advanced by Respondent for failing to award him a bonus, in that no scores were forwarded to the Assistant Comptroller General for PEMD. She received only a rank ordering of the names of the eligible employees.

Likewise, upon consideration of all the testimony of the various witnesses, the exhibits, the arguments of the parties and an assessment of the credibility of the various witnesses, I find that Petitioner failed to carry his ultimate burden of proving that Respondent discriminated or retaliated against him when Respondent did not select him for the position of Band III Social Science Analyst. The position Petitioner sought was a supervisory project manager position which came into existence as part of Respondent's lateral reassignment program.⁹ Tr. 201. Respondent advertised the position as vacant in its August, 1989 issue of Management News.¹⁰ Only applicants within GAO could apply and be considered for the position.

Upon learning of the vacancy, Petitioner applied for the position through submission of the appropriate documentation.¹¹ To be considered, an applicant was required to complete and submit the appropriate paperwork to his or her home unit. The home unit then forwarded the applications to Personnel. In

Personnel, the applications were reviewed to determine whether they met the minimal qualifications set forth in the announcement. Upon completing the initial screening phase, Personnel forwarded the application packages to the selecting unit. Tr. 209. In the selecting unit, the applications were held until a panel was created to rate and rank the applicants and establish who among the applicants should be placed on the highly qualified or best qualified list for consideration by the selecting official.

In this case, eleven individuals applied for the position in question. See Respondent's Exhibits 6A-6K, and Petitioner's Exhibit No. 5. Petitioner was one of the eleven application packages and completion of its initial qualification review and certification, forwarded all eleven application packages to the Human Resources Manager in the Human Resources Division (HRD). Tr. 209. The Human Resources Manager then made a review of the packages to determine whether each application package contained all of the necessary forms and documents. Tr. 210.

Upon receipt of the eleven application packages, and consistent with Respondent's selection procedures, the Human Resources Manager determined that a merit selection panel was necessary and he appointed three members to the panel. Tr. 209, 216. One member of the merit selection panel was in charge of Respondent's data analysis group, the second was responsible for Respondent's income security issue area, and the third was a Band III Social Science Analyst. Although Petitioner suggests discriminatory and retaliatory motive in establishing the merit selection panel, the evidence presented does not sustain his contention.¹² The testimony of the Human Resources Manager for the Human Resources Division on why he selected the three panel members was very credible and did not suggest or contain a hint that the business reasons given were not true.

Petitioner's biggest bone of contention centers around his failure to make the best qualified list. Upon appointment of the panel, the panel members met and after deliberations rated and ranked the applicants in descending order, one through eleven. After rating and ranking the applicants, the panel established a cut-off score to determine which of the eleven applicants should be placed on the best qualified list for referral to the selecting official. The cut-off score was set at 56.7 and all applicants who had a score of 56.7 and above were placed on the best qualified list. Nine of the eleven applicants made the best qualified list. Petitioner was ranked eleventh and was one of the two applicants who did not make the best qualified list. It is not clear whether Petitioner believes that there should or should not have been a cut-off score, but it is clear that he believes he should have appeared on the best qualified list. However, there is merit in Respondent's argument that the ranking and rating process it followed was not discriminatory or retaliatory against Petitioner. With one exception,¹³ Petitioner failed to offer sufficient evidence to overcome Respondent's business reasons given for his non-selection. Each of the panel members testified about the role Petitioner's prior performance appraisals and his background played in the rating and ranking he received. Tr. 263, 279, 285-287. The panel members testified that Petitioner's prior performance appraisal ratings were the lowest of the eleven applicants. Petitioner does not claim that his prior performance appraisals were not low. Instead, he claims that, with the expectation of his most recent rating, the appraisal rating process was discriminatory against him. Yet he never file a prior complaint about the ratings he received. Therefore, if Petitioner had the lowest prior performance appraisal ratings and the prior performance appraisal ratings were the centerpiece of the selection rating and ranking process, it would be expected that he would be the lowest rated and ranked applicant. Petitioner offered little in the way of rebuttal to this conclusion.

The only rebuttal by the Petitioner is his claim that the application of applicant who was selected contained a technical flaw and when his application contained a technical flaw for a prior position, his application received low ratings, causing it to be rejected. However, the two situations are not similar or comparable situations. In the case where Petitioner's application was rejected, he admits that he failed to read carefully and follow clear directions that said he would not receive any points if checked more than one box. In the case of the selectee, he submitted all of the required documents and on one document, which had to be completed by Respondent, the selectee's reviewing supervisor failed to sign. The document did contain the signature of the selectee's immediate supervisor and it did not appear to be the fault of the selectee that the signature of the second level or reviewing supervisory was not present. The situations are simply not the same. Therefore, Petitioner failed to establish pretext.

CONCLUSION

For the reasons stated above, Petitioner's Petition for Review is hereby dismissed with prejudice.

Notes

1. The Administrative Judge's term as a member of the Board expired on October 1, 1991, prior to this decision being issued. Thereafter, the Board appointed him to act as Administrative Judge for the purposes of issuing this decision.
2. At the hearing, Petitioner requested for the first time production of the Equal Promotion Review Program (EPRP). During oral argument on the question of whether Petitioner should be granted the extraordinary request, at such a late date, Petitioner's counsel conceded that he chose as a trial tactic not to request the EPRP during discovery. Instead, he chose to wait until discovery closed and he was within the Courthouse to seek his discovery of a document he planned to use during the hearing. More importantly, Petitioner failed, during oral argument, to establish that production of the EPRP would lead to evidence which would be admissible during the hearing or that his last minute tactics would not unduly delay the hearing. Petitioner did not advance a compelling reason to grant his request for extraordinary relief. Accordingly, Petitioner's request for production of the EPRP was denied.
3. Although Petitioner was requested several times during the hearing to provide specific details about the EEO activity he engaged in in 1984, he failed to do so. While it may be assumed from very general testimony given by a number of witnesses, in response to questions advanced by Petitioner, that Petitioner filed a complaint some time prior to 1986, Petitioner never put forth any direct evidence on this point. However, the Assistant Comptroller General for PEMD testified that Petitioner did file an EEO law suit against her in 1985 or 1986. Tr. 384. This testimony, while not specific in detail, is sufficient to support Petitioner's claim that he was involved in protected activity.
4. Respondent phased in the permanent merit increase component in 1990.
5. See the testimony of the Deputy Assistant Comptroller General For Human Resources and Respondent's Exhibit #15 for a discussion of the assessment process. I find this testimony credible.
6. There is no doubt that Petitioner met the final requirement to show that he did not receive a bonus while others did receive a bonus.

7. Petitioner testified that he should have been assessed for his bonus as part of a unit that included all GS-13s in the Program Evaluation and Methodology Division. Tr. 483-486.

8. The contribution statement was prepared by the employee. It was optional and there were no restriction on the information an employee could place in his or her contribution statement.

9. Under Respondent's lateral reassignment program, an employee from one unit within GAO may apply for consideration to transfer to another unit within GAO.

10. The first time the position was advertised, it was incorrectly advertised as HRD-90-4. In a subsequent advertisement, it was corrected to read HRD-90-7.

11. To be considered, an applicant had to submit performance appraisals for three (3) years (i.e., Form 536); GAO Form 88 (a supervisory assessment on additional ranking factors); GAO Form 3537 (an employee profile sheet); Form 501A (a control sheet); GAO Form 106 (a control sheet); and GAO Form 67-A.

12. Petitioner suggested that because the Human Resources Manager and the merit selection panel members knew the Assistant Comptroller General for PEMD and knew of his EEO complaints, they conspired to discriminate and retaliate against him. Petitioner presented no evidence in support of this claim. Knowledge of protected activity by Petitioner does not, alone, prove unlawful retaliation. [See, e.g., Waddell v. Small Tube Products, Inc., 799 F.2d 69 (3rd Cir. 1986)]

13. In one instance, I found the testimony of one of the panel members regarding his knowledge of Petitioner's EEO activity unbelievable. That particular member testified that he had no knowledge of Petitioner filing an EEO complaint. The other two members testified that they knew of the complaint, but took no action against the Petitioner because he filed the complaint. There was further testimony, which was credible, that the Panel member who claimed lack of knowledge, had some involvement in the processing of Petitioner's EEO complaint. This finding, however, is insufficient to overcome the weight of the other evidence in the record against Petitioner's claim of discrimination and retaliation.